UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

Austin, Texas

COOK MAIL SERVICES, INC.**1/**

Employer

and Case No. 16-RC-10226

AMERICAN POSTAL WORKERS UNION,
AUSTIN, TEXAS AREA LOCAL 299

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:**2/**

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. **3/**
3. The labor organization involved claims to represent certain employees of the Employer. **4/**
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act. **5/**

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

   INCLUDED: Full-time truck drivers, part-time truck drivers, and mechanics.

   EXCLUDED: All casual employees, dispatchers, secretaries and supervisors as defined by the Act.

DIRECTION OF ELECTION6/

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to issue subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of the Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained the status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they

desire to be represented for collective bargaining purposes by the American Postal Workers Union, Austin, Texas Area Local 299.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list containing the full names and addresses of all eligible voters which may be used to communicate with them. ***Excelsior Underwear, Inc.***, 156 NLRB 1236 (1966); ***NLRB v. Wyman-Gordon Company***, 394 U.S. 759 (1969); and ***North Macon Health Care Facility***, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the NLRB Region 16, 819 Taylor Street, Room 8A24, Fort Worth, Texas 77002, on or before June 19, 2000. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by June 26, 2000.

DATED June 12, 2000, at Fort Worth, Texas.

/s/ Martha Kinard

Martha Kinard, Acting Regional Director
NLRB Region 16

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1. At the hearing, the petition was amended to reflect the Employer's correct name.

2. The Employer and the Petitioner filed briefs which were duly considered.

3. The parties stipulated, and I so find, that Cook Mail Service, Inc. is a Texas corporation, engaged in the business of transporting the United States mail. During the past 12 months, a representative period, it derived revenues in excess of $50,000 directly from sources located outside the State of Texas.

4. The parties did not stipulate regarding the status of the Petitioner as a labor organization as defined in Section 2(5) of the Act. Nevertheless, the record amply reflects the Petitioner is an organization which admits members who are employees of an employer and that the Petitioner exists, in part, for the purpose of collective bargaining with an employer on behalf of employees concerning wages, hours, labor disputes, and other conditions of employment. The record reflects that the Petitioner represents 15 employees, has a local president and has filed grievances for employees. Accordingly, I find that the Petitioner, American Postal Workers Union, Austin, Texas Area Local 299, is a labor organization within the meaning of Section 2(5) of the Act.

5. By its petition, the Petitioner seeks to represent a single, employer-wide unit consisting of the Employer's full-time truck drivers, part-time truck drivers and mechanics and excluding casuals, dispatchers, secretaries and supervisors as defined in the Act. There is no issue in this matter regarding the appropriateness of the petitioned-for unit. Accordingly, I find the petitioned-for unit to be appropriate.

Manual, Mail or Mixed Manual-Mail Election

The issues presented at the hearing were whether a mail, manual or mixed mail-manual election should be held at the Employer's mail delivery locations in Dallas, Texas, hereinafter Dallas, and Waco, Texas, hereinafter Waco, where the Employer delivers and retrieves mail and whether the Petitioner is disqualified from representing the employees of the Employer because the Petitioner represents employees of the United States Post Office.

With respect to the former issue, the record reflects that the Employer operates a trucking company that delivers and retrieves mail to, from and within three cities, Austin, Dallas and Waco. The Employer employs ten drivers for mail deliveries in Dallas, eight drivers for mail deliveries in Waco and thirty drivers for mail deliveries in Austin, Texas, hereinafter Austin. For the most part, all of the Employer's mail delivery drivers have a designated start time and accomplish their designated delivery within a twenty-four hour period. The Employer employs both highway-route drivers that drive from one Texas city to another and city-route drivers who make deliveries within the confines of either Dallas, Waco or Austin city limits and sometimes outside the city limits. The Employer's 48 drivers are never in one location at any given time, as they have staggered shifts and scattered delivery destinations. The record reveals that at least one driver is off work every day.

The record discloses that the Employer makes mail deliveries to four different locations within the Dallas metropolitan area. The mail deliveries originate at the Dallas Main Post Office and are taken to the General Mailing Facility, the Bulk Mail Facility, the North Texas Facility, and (or) the International Facility. All of the foregoing facilities are owned or leased by the USPS and are within forty-five minutes driving time from one another. The Employer's mail delivery operation in Dallas is operational twenty-four hours a day and drivers have staggered schedules. As one driver is leaving any given Dallas facility, another driver is pulling in to pick up mail.

The Employer employs ten drivers in Dallas and all except one must go to the "yard" (one of the five aforementioned facilities owned by the USPS) to pick up their tractors; the one that does not go to the "yard" picks up his tractor at the International facility. There is never an occasion when all drivers are at the "yard" at the same time. Each Dallas driver delivers and picks up from all of the Dallas facilities except for the North Texas facility, located in Coppell, Texas, where only two drivers deliver. All Dallas drivers (except one) drive through the Bulk Mail Center facility at least once every 24-hour period.

With respect to the issue of scattered voters, the record reflects that of the ten Dallas drivers, at least two reside one or more hours driving distance from Dallas. One lives in Mesquite, Texas and another in Burleson, Texas. The Employer does not employ mechanics in Dallas.

In its brief, the Employer urges that a hotel, the Ramada Inn on Market Central Boulevard, located in close proximity to the Bulk Mail Center in Dallas, could be used as a potential voting place. However, the record reflects that driving a tractor-trailer to such hotel would be problematic due to the difficulty of safely maneuvering a tractor-trailer in and out of a hotel parking lot.

The record reflects that the Dallas highway-route drivers who drive to Austin usually drop off their trailers at the Waco Post Office and bob-tail (drive only the truck without the trailer) to the Employer's facility in Austin and re-fuel their trucks. The Employer's facility in Austin is less than two miles from the Austin Post Office. The drivers are

given thirty minutes to an hour as break-time between deliveries. However, the amount of break-time varies and sometimes a driver may not get to take a break. A driver's break-time varies depending on such factors as traffic.

The record discloses that the Employer makes mail deliveries to two locations within the Waco area. The mail deliveries originate at the Waco Main United States Post Office and from there are taken to the Post Office Annex. Both of these facilities are owned by the USPS and are within ten minutes driving distance from one another. The Employer operates twenty-four hours a day and drivers have staggered schedules (as one driver is leaving the Waco Post Office another driver is pulling in to pick up mail). While all Waco drivers must go to the Main Post Office to pick up mail, they are never all there at the same time.

In its brief, the Employer argues that employees should be allowed to vote by manual ballot elections at all three of the locations where the Employer operates. The Employer argues that the record reveals one voter who cannot read. Furthermore, the Employer suggests the Fairfax Inn, located approximately one mile from the Waco Post Office and the Ramada Inn in Dallas could be utilized as voting locations. However, Petitioner argues that a driver attempting to make his deliveries on schedule may forego attending an election in order to avoid the traffic stress and the risk of being late for a delivery or pick up. Furthermore, in order for a manual election held in Dallas to be successful, the voting at the hotel would have to be open for an inordinate period of time due to the staggered schedules of the Dallas drivers. The record evidence reveals that it is imperative that drivers pick up trailers on time.

While the parties agree that a manual election may be appropriate for Austin drivers, the Petitioner argues, citing ***San Diego Gas & Electric***, 325 NLRB 1143 (1998) and ***M&N Mail Service, Inc.***, 326 NLRB No. 43 (1998), that the voting for the Dallas and Waco drivers should be conducted by mail ballot election because the voters have scattered work schedules and are never at a common place at a common time. Petitioner argues that a distinction should be made for the Dallas and Waco facilities, not only due to the employees' scattered work schedules, but also due to the fact that the Employer does not own facilities in Dallas or Waco and the proposal to hold the elections at hotels in Dallas and Waco is detrimental to the voting process for the reasons set forth heretofore. In this regard, the Petitioner argues that the Employer's proposal for manual voting in Dallas and Waco is impractical because the locations proposed have not been evaluated to see if they can accommodate a tractor-trailer or consulted regarding the potential traffic problems. Furthermore, Petitioner argues that the proposed hours for the Waco location would not be sufficient to accommodate all voters. One Dallas driver who only travels to Temple, Texas, and swaps seats with another driver normally does not stop in Waco and would be required to make a detour to an unknown destination in order to vote. Petitioner also argues that one of the Waco drivers works a shift that is not encompassed in the Employer's proposed time-frame for a manual election in Waco.

It is well settled that the Board has delegated to Regional Directors discretion in determining the arrangements for an election, including the location of the election and

whether it should be conducted by manual balloting or mail ballot. ***Halliburton Services***, 265 NLRB 1154 (1982). As the Board stated in ***National Van Lines***, 120 NLRB 1343, 1346 (1958):

> [C]ircumstances surrounding working conditions in various industries require an adaptation of established election standards to those peculiar conditions. Because of these circumstances, the Board has invested Regional Directors with broad discretion in determining the method by which elections shall be conducted. Only where it is affirmatively shown that a Regional Director has clearly abused the discretion afforded him to conduct representative [sic] elections will the Board nullify an election and prescribe other election standards.

The Board's long-standing policy has been that representation elections should as a general rule be conducted manually, either at the workplace or at some other appropriate location. The Board has also recognized that in certain instances the Regional Director, because of circumstances that would tend to make it difficult for eligible employees to vote in a manual election, may reasonably conclude that conducting the election by mail ballot, or a combination of mail and manual ballots, would enhance the opportunities for all to vote. ***San Diego Gas & Electric***, 325 NLRB 1143, 1144 (1998).

The Board in ***San Diego Gas & Electric***, supra, specifically held:

> When deciding whether to conduct a mail ballot election or a mixed manual-mail ballot election, the Regional Director should take into consideration at least the following situations that normally suggest the propriety of using mail ballots: (1) where eligible voters are "scattered" because of their job duties over a wide geographic area; (2) where eligible voters are "scattered" in the sense that their work schedules vary significantly, so that they are not present at a common location at common times; and (3) where there is a strike, a lockout or picketing in progress. If any of the foregoing situations exist, the Regional Director, in the exercise of discretion, should also consider the desires of all the parties, the likely ability of voters to read and understand mail ballots, the availability of addresses for employees, and finally, what constitutes the efficient use of Board resources, because efficient and economic use of Board agents is reasonably a concern. We also recognize that there may be other relevant factors that the Regional Director may consider in making this decision, but we emphasize that, in the absence of extraordinary circumstances, we will normally expect the Regional Director to exercise his or her discretion within the guidelines set forth above.

In the instant case, the evidence reveals that the eligible voters in Dallas and Waco have staggered work schedules and are not present at a common time in a common location. Moreover, the Employer does not own facilities in either Dallas or Waco. Furthermore, the record reveals that if a manual election were to be conducted in Dallas and Waco, extended hours would be necessary in an attempt to avoid disenfranchising voters. In order to accommodate manual elections at all three of the Employer's delivery points, Board agents would be required at all three sites on one day. At least three Board agents

would be required to cover the eighteen-and-one-half hours of manual voting requested by the parties in Austin. The Waco election would require at least one Board agent to conduct the proposed four-hour manual voting period and another Board agent to conduct the proposed four-hour Dallas election. The evidence also reflects that the voters at all three locations would be voting during working time and therefore would have to contend with work schedules, traffic conditions and the difficulty of driving a tractor-trailer to an unknown area. In order to enhance the opportunity for all to vote and based on the fact that the drivers have staggered work schedules, are not present at a common time in a common location, and the fact that the Employer does not own a facility in Waco or Dallas, I shall order a mail ballot election for voters in Austin, Dallas and Waco. ***San Diego Gas & Electric***, 325 NLRB 1143, 1144 (1998).

Disqualifying Conflict of Interest

As referenced above, the Employer argues that the instant petition should be dismissed because the Petitioner is disqualified from representing the employees of the Employer because Petitioner represents USPS employees. The record reveals that the Petitioner represents 15 mechanics and two secretaries who are employees of the USPS in Austin. The Petitioner does not represent any USPS employees employed as drivers and has never represented employees who perform the same type of work that the Employer is currently performing.

The record evidence disclosed that the Employer is a private company solely engaged in the transportation of United States mail in Austin, Dallas and Waco. The Employer derives one hundred percent of its business from contracts with the USPS. In Austin, the Employer transports mail from the General Mail Facility to smaller Post Offices in Westlake and Round Rock. These contracts are called inner-city contracts. In Waco, the Employer transports mail from the Waco Post Office to associate Post Offices in Lampasas and Copperas Cove. In Dallas, the Employer transports mail from Dallas to Austin ten times per day and each round trip takes approximately nine and one-half hours. The Employer does not have an inner-city contract in Dallas or Waco.

The Petitioner has no equipment, no motor vehicles and no transportation employees for transporting mail. Petitioner owns no trucks or facilities necessary for transporting mail. Petitioner employs no mechanics, dispatchers, drivers or others for purposes of transporting mail. Clearly, there is no direct conflict of interest between the Petitioner and the Employer.

The evidence further disclosed that the Employer negotiates their USPS contracts annually with USPS representatives for the Southern Region in Dallas. Every four years, the Employer's charge for the work performed is compared to the USPS, Motor Vehicle Service. The record reflects testimony by the Employer that it is forced to reduce their contract rates in order to stay competitive and not risk losing the contracts to the USPS, Motor Vehicle Service. The USPS will not renew the Employer's contracts if the Employer does not stay competitive with the rates that the USPS, Motor Vehicle Service is charging.

The Employer argues on brief that the Petitioner has an innate conflict of interest because of its desire that the USPS retain all of its mail delivery by truck in-house. In its brief, the Employer relies on **Catalytic Industrial Maintenance Co.,** 209 NLRB 641 (1974) in support of its contention that the Petitioner should be disqualified from representing the employees in the petitioned-for unit. In **Catalytic**, a post-certification proceeding, the Board affirmed the ALJ who found the Union's certification should be revoked because of an "overt act" committed by the Union, creating a conflict of interest in the Union's representation of the both the contracting (Oxochem) and subcontracting employers' (Catalytic) employees. The ALJ found that the union demanded that the subcontracting employees be brought "in-house" to the contracting employer and that demand, in fact, impacted the negotiation of a new collective-bargaining agreement between the union and the contracting employer, Oxochem. The Judge noted that by seeking to force Oxochem to retain for its employees work which it had contracted to Catalytic, the union was acting in substantial conflict of interest with regard to its obligations to the employees of Catalytic and such conflict was inherently inimical to the bargaining relationship between the union and Catalytic.

The facts in the instant case are clearly distinguishable from those in ***Catalytic Industrial.*** First, the instant case is not a post-certification proceeding. Secondly, there is no record evidence that the Petitioner represents employees performing the same work as that performed by employees in the petitioned-for unit. Furthermore, there is no record evidence that the Petitioner has performed any "overt act" tending to show that it would or could act in an inconsistent manner with its future representational obligations with regard to the employees in the petitioned-for unit.

The Employer argues that the Petitioner should further be disqualified from representing the Employer's mechanics because they will be in direct competition with the USPS mechanics thereby creating a conflict of interest for the Petitioner. The record discloses that the Petitioner represents USPS mechanics in Austin. However, the Employer offered no evidence as to the duties performed by the USPS mechanics. The Employer's argument that the proposed representation of the mechanics would be a conflict of interest is not substantiated by any record evidence. Additionally, the Employer argues that USPS and the Employer compete for Austin inner-city routes. The record evidence discloses that the USPS on occasion has wrongfully delivered inner-city mail. However, the Employer presented no evidence that the USPS employees delivering the mail were represented by the Petitioner or the International APWU.

In its brief, the Employer attempts to distinguish two Regional Directors' decisions, ***Rood Trucking Company Incorporated***, Case No. 6-RC-11679, (May 26, 1999) and ***Pat Salmon and Sons, Inc.***, Case No. 26-RC-8159, (May 10, 2000), wherein a disqualifying conflict of interest was not found. The Employer argues that the two above-referenced decisions are distinguishable from the instant case because those cases focused on the conflict of interest between American Postal Workers Union, hereinafter APWU, and the USPS. Employer further asserts that in the instant case the Petitioner seeks to represent the mechanics of the Employer and presently represents USPS mechanics, thereby creating a disqualifying conflict of interest. There is no record evidence that the

Employer employs mechanics at any of the three locations that the Employer operates or of the job duties of the mechanics employed by the USPS. The Employer further argues that the Petitioner's Local President admitted that Article 32 of the national agreement between International APWU and the USPS will create a conflict of interest and the motivating reason for the organizing of the Employer's employees is to protect USPS employees. The record does not reflect such an admission.

In ***Rood Trucking Company Incorporated***, supra, the Regional Director found no conflict of interest in APWU's representation of the Employer's employees because USPS employees handled inner-city routes and Employer's employees handled long-haul routes. In ***Pat Salmon and Sons, Inc.***, supra, the Regional Director found no conflict of interest because the USPS in Little Rock, Arkansas did not have a Motor Vehicle Service Division and no potential for competition existed. In the instant case, the record reveals that the Petitioner does not represent any drivers performing the same jobs as those in the petitioned-for unit. Furthermore, the Employer presented no record evidence in support of its contentions regarding the Employer's mechanics.

In its brief, the Employer argues that the Petitioner's International APWU has taken a consistent position against the privatization of USPS jobs and has uniformly opposed the contracting and (or) subcontracting of any jobs covered by its national agreement with the USPS. The Employer argues that any International APWU conflict of interest is a conflict of interest for the Petitioner. In support of its position that the Petitioner has a disqualifying conflict of interest, the Employer also argues the International APWU has negotiated a provision in the national agreement restricting the USPS's right to contract work out. Article 32 requires the USPS to provide APWU certain information regarding the awarding of new contracts or the renewal of new contracts to truck carriers for the transportation of mail. The Employer also argues that the Petitioner has filed grievances in an effort to preclude the USPS from contracting out mechanic work.

The Employer argues that direct competition is not a necessary finding in this case. That there is enough evidence if there exists…"the proximate danger of infection of the bargaining process" ***NLRB v. Buttrick Company***, 399 F2d 505, 507 (1st Cir. 1968). The Employer speculates that if the Petitioner is certified to bargain on behalf of the Employer's employees, Petitioner will be in a position to make intemperate demands upon the Employer with respect to wages, hours, and working conditions because the Employer will either have to concede and thereby price itself out of competition with the USPS workers or refuse and set the stage for a strike that will take it out of competition with the USPS workers. The court in ***Buttrick***, supra, remanded the case to the Board to determine whether the potential for conflict of interest would have an adverse affect on the bargaining relationship. The Board reaffirmed its earlier decision finding that evidence of a potential conflict of interest was remote. ***David Buttrick Company***, 167 NLRB 438 (1967). Upon review, the court reconsidered its earlier decision and affirmed the Board and stated there was a considerable burden on an employer to come forward with a showing that a danger of a conflict of interest interfering with the collective bargaining process is clear and present. ***NLRB v. Buttrick Company***, 399 F2d 505, 507

(1st Cir. 1968). The Employer has not met that burden here. Moreover, the Employer provided no evidence at the hearing to support the Employer's speculation.

The Employer further argues that a conflict of interest is inevitable if the Petitioner is certified as the bargaining agent for the employees of the petitioned-for unit because union dues paid by the petitioned-for unit employees could potentially be used to fight against USPS subcontracting efforts, resulting in a situation whereby members could possibly be paying to stop their own work. These assertions are not supported by the record evidence, but amount to mere speculation on the part of the Employer.

It is well established that a union may not represent the employees of an employer if there exists a conflict of interest on the part of the union that would jeopardize a good-faith collective bargaining relationship between the parties. The Board's standard for finding that a union has a disqualifying conflict of interest is the showing of a "clear and present danger" of interference with the collective bargaining process. ***Alanis Airport Services, Inc.***, 316 NLRB 1233 (1995), citing ***Bausch & Lomb Optical Company***, 108 NLRB 1555 (1954). In ***Pony Express Courier Corp***., 297 NLRB 171 (1989) and ***Garrison Nursing Home***, 293 NLRB 122 (1989) the Board found that disqualification was appropriate where a personal financial relationship exists between executives of a labor organization and the employer whose employees the union seeks to represent. The burden of proof for establishing that a disqualification exists falls on the Employer and "strong public policy favoring free choice of a bargaining agent by employees" is not to be "lightly frustrated." ***Quality Inn Waikiki***, 272 NLRB 1, 6 (1984), enfd., 783 F2d 1444 (9th Cir. 1986), citing ***Sierra Vista Hospital, Inc***., 241 NLRB 631, 633 (1979).

The record is void of any evidence establishing the types of conflicts envisioned by the Board in the above-referenced cases and the Employer has cited no cases which would compel a finding disqualifying the Petitioner in the instant case. For the reasons stated above, and the record as a whole, I find that the Petitioner's representation of the Employer's employees does not constitute a "clear and present danger" to the collective bargaining process and I do not disqualify the Petitioner from representing the employees in the petitioned-for unit.

5. In accordance with Section 102.67 of the Board's Rules and Regulations, as amended, all parties are specifically advised that the Regional Director will conduct the election when scheduled, even if a request for review is filed, unless the Board expressly directs otherwise.

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